JD(SF)–48–14
Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

SUN CAB, INC., D/B/A
NELLIS CAB COMPANY

and Cases 28–CA–118942

DAWIT ALEMU, an Individual

Nathan Higley Esq. and Larry Smith, Esq.
for the General Counsel.

James Winkler, Esq. (Littler Mendelson P.C.),
for the Respondent.

Dawit Alemu, in Pro Se, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Las Vegas, Nevada on April 15, and June 3– 4, 2014, upon the complaint, and notice of hearing, (complaint), issued on January 31, 2014, by the Regional Director for Region 28.

The complaint alleges that Sun Cab, Inc., d/b/a Nellis Cab Company, Respondent, violated Section 8(a)(1) (3) and (4) of the Act by suspending and discharging its employee Dawit Alemu for engaging in union and other protected concerted activity and for filing charges or giving testimony under the Act.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

FINDINGS OF FACT

Upon the entire record here, including the briefs from Counsel for the General Counsel and Respondent, I make the following findings of fact.

I. JURISDICTION

Respondent admitted it is a corporation with an office and place of business in Las Vegas, Nevada where it engages in providing taxicab services and admitted it derived gross revenues in excess of $500,000 during the last 12 months. While it denied that it has purchased and received goods valued in excess of $50,000 directly from points located outside the State of Nevada, it admitted that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

This is the third chapter in the history of Respondent before the Board. In his decision[1] dated December 27, 2012, in case 28–CA–079813, Administrative Law Judge Jay Pollack found Respondent violated Section 8(a)(1) of the Act in suspending 17 employees, including the charging party Dawit Alemu, for participating in a lawful work stoppage, and by interrogating employees about their union activities and sympathies. However, Judge Pollack found that Respondent did not violate Section 8(a)(3) of the Act in terminating its driver Abiy Amede, concluding that Respondent discharged Amede consistent with terminations of similarly situated drivers. Judge Pollack's decision did not specify how Amede's discharge was consistent with Respondent's discharge of similar drivers. Judge Pollack's decision is pending before the Board on exceptions filed by Respondent.

In a decision[2] dated June 6, 2014, in case 28–CA–106245, Administrative Law Judge Gerald Etchingham found Respondent violated Section 8(a)(1) of the Act by coercively interrogating its driver Firesilassie Woldeyes about his union activity, by threatening Woldeyes with discharge and blacklisting from hire by other companies due to his union activity and by threatening employees, including Alemu, with reduced pay and the futility of employees selecting the union as their bargaining representative. Judge Etchingham also found Respondent violated Section 8(a)(3) of the Act by discharging Woldeyes for engaging in union activity. Judge Etchingham's decision is pending before the Board on exceptions filed by Respondent.

While neither Judge Pollack's nor Judge Etchingham's decision is final, it is appropriate to consider and rely on those findings in deciding the issues in this case. The issues decided by Judges Pollack and Etchingham were fully litigated before them, and relitigating or revisiting those issues de novo in this related proceeding, while the matter is before the Board, would be antithetical to judicial efficiency and economy and potentially lead to inconsistent results and unnecessary delays. See *Wynn Las Vegas, LLC*, 358 NLRB No. 81 fn. 1 & JD. at 4–5 (2012); *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394–395 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000); and *Detroit Newspapers Agency*, 326 NLRB 782 fn. 3 (1998), enf. denied on other grounds 216 F.3d 109 (D.C Cir. 2000).

[1] JD(SF)–57–12
[2] JD(SF)–26–14

A. The Facts

1. Respondent's organization

Respondent is a taxicab company operating in Las Vegas, Nevada. Respondent employs nearly 400 drivers. Dawit Alemu (Alemu)[3] was employed by Respondent as a driver from January 9, 2013–December 2013.

Jaime Pino (Pino)[4] has been Respondent's director of operations for 17 years. Pino's duties include determining which drivers to terminate. Pino at times, collaborates with Respondent's General Manager, Michelle Languille (Languille) in deciding who to fire. Pino supervises Office Supervisor Osmel Alonso (Alonso). Judge Etchingham found that Pino has authority to hire, fire, and discipline all of Respondent's employees. He also found that Osmel Alonso (Alonso), Road Supervisors Rodney Lugo (Lugo), Larry Proctor (Proctor) and Walleligne Wolde (Wolde) have been supervisors at Respondent since they have authority to issue discipline to Respondent's drivers. Respondent admitted that Ray Chenoweth, Jaime Pino, Walleligne "Wally" Woldeyes and Osmel Alonso are supervisors within the meaning of Section 2(11) of the Act or agents within the meaning of Section 2(13) of the Act. In agreement with Judge Etchingham, I find that Pino, Alonso, Lugo, Wolde, and Proctor have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

Alonso posts drivers' shifts and handles drivers' requests for time off and maintains a daily log. Sandra Pineda (Pineda) is Respondent's claims administrator. She deals with unemployment issues and enters accident information into Respondent's system. Respondent's policy provides for the discharge of employees who have too many vehicular accidents.

2. The organizing activity

In early 2012, the Las Vegas Taxicab Authority (TA) was considering whether to issue more medallions, the license to operate a cab. Authorizing additional taxicabs would increase competition among the current cabs on the road. In protest of the TA action on February 4, 2012, taxicab drivers from all 16 Las Vegas cab companies participated in a concerted extended break where they removed their cabs from service. The work stoppage lasted about 2– 3 hours. Judge Pollack found Respondent wrongfully suspended 17 of its Ethiopian drivers for participating in the extended break. See JD(SF)–57–12 at 7.

Judge Pollack found that after the February 4 work stoppage, Pino interrogated 17 of its drivers about their concerted activity and the identity of the leader of the work stoppage. Judge Pollack found further that Respondent unlawfully suspended 17 of its drivers, including Alemu,[5] for participation in a lawful work stoppage. However, Judge Pollack found that Respondent did not violate the Act in terminating its taxi driver Abiy Amede, concluding that Respondent fired Amede consistent with its practice of discharging other drivers involved in accidents in 2012.

[3] Alemu is also known as Dawit Aleme or Dait Alemu in ALJ Pollack's and ALJ Etchingham's decisions.

[4] Pino was referred to as Pinto in Judge Pollack's decision.

[5] Alemu is erroneously referred to in Judge Pollack's decision as Dait Alemu.

Judge Pollack found that Respondent fired 26 other drivers for driving accidents in 2012 and that Amede had eight accidents at the time he was terminated. Judge Pollack did not cite evidence as to how many accidents Amede had in 2012 compared with other drivers who were terminated.

Judge Etchingham found that on or about February 16, 2012, Respondent learned that the Industrial, Technical, and Professional Employees Union, AFL–CIO (Union) was trying to organize Respondent's cab drivers when it received a letter from the Union dated February 16, 2012, stating that the Union was engaged in a union organizing campaign among its taxi drivers.

Judge Etchingham found that on or about March 22, the Union filed a petition in case 28–RC–100893 to represent Respondent's taxi drivers and on April 20, an election was held at Respondent to determine whether the petitioned-for unit wished to be represented by the Union. A tally of ballots was completed with 125 votes cast for the Union and 227 votes cast against the Union.

In his decision Judge Etchingham found that in March 2013:

1. Supervisor Wolde unlawfully interrogated its driver Woldeyes about why he wanted to bring in the union;

2. Wolde made unlawful threats to Woldeyes, including threats of futility of voting for the Union, threats that drivers who supported the Union would be fired, threats to cease engaging in union activity and threats of blacklisting from other Las Vegas cab companies;

3. Road supervisor Alonso unlawfully threatened Alemu with the futility of bringing in the Union; and

4. Director of operations Pino unlawfully told a group of they would get less money, hours, less favorable shifts and less desirable taxis if they voted for the Union

3. Dawit Alemu's discharge

Dawit Alemu was employed by Respondent as a taxi driver from January 2010, until his termination on December 2, 2013. According to his notice of Eeployee Ttrmination,[6] Alemu was fired for, "Too many accidents since he was rehire (sic)." Alemu participated in the February 4, 2012 work stoppage and was threatened by Supervisor Alonso with the futility of organizing a union in March 2013. In a letter from the Union dated February 16, 2012, Alemu was named as one of the union organizing committee members.[7] On November 5, 3013, Alemu gave testimony in support of Charging Party Woldeyes at the above referenced unfair labor practice hearing conducted by ALJ Etchingham. Both Alonso and Pino were present when Alemu testified.

[6] GC Exh. 5.
[7] R. Exh. 10.

The record reflects that Alemu was involved in a number of minor auto accidents while working in 2012 and 2013.[8] The first accident happened on November 2, 2012, when a passenger opened the cab door causing damage to the door. While Alemu was held at fault, it was stipulated at the hearing that this should not be counted as an at fault accident since Respondent changed its policy, finding that passengers causing damage to cabs by carelessly opening doors was not the drivers' fault. Pinot testified[9] in this regard:

> Well since 2011 door accidents are very common in our industry and it's usually caused by the passengers when they open the door into oncoming traffic. We do -- have come up with that we -- even though the driver does tons of thing we tried everything that they can do but they don't do it. Watch out when you open the door. There's a limo coming on the side. And nothing ever worked. So among the cab companies when we have a door that is bent, scratched because one of the passengers open it we have an unwritten policy that it's you fix your door and we fix ours. So therefore, if the driver had a door accident we consider the accident not at fault.

A second accident occurred on December 23, 2012, when Alemu noticed damage to the cab he was driving at the end of the day. Alemu claimed in the accident report[10] that he did not cause the damage and that the cab was not the one he usually drove. Fault was undetermined and it was noted that the damage to the cab could be rubbed out. There is no record evidence that Alemu was charged with this accident. Moreover, there is no evidence that Respondent ever undertook an investigation to determine fault in this case.

A third accident took place on August 27, 2013, at the Paris Hotel when Alemu struck a cab from another company. On the accident report[11] Wolde noted that it was the other driver who failed to give way at a yield sign. However, Pino's notes attached to the accident report state that the camera in Alemu's taxi shows that Alemu failed to yield the right-of-way. However the testimony of both Alemu and Roy Harden, Respondent's IT consultant and a former taxi driver in Las Vegas, established that the camera failed to show a yield sign that the other driver ignored. Alemu honked at the driver to alert him to his presence but the driver blew through the yield sign. Despite never being interviewed by Pino, Alemu was found at fault.

The final accident occurred on November 26, 2013, at the MGM Grand Hotel. The accident report[12] reflects that Alemu was waiting in the taxi line to pick up a fare when he struck the rear end of a taxi in front of him. There was no damage to either taxi and Alemu was found at fault. Pino's notes[13] attached to the accident report reflects that Alemu looked to the side and just before striking the cab in front of him he looked forward again. Pino speculates that Alemu hit the other taxi purposely. From a review of the video, while I am unable to determine if Alemu intentionally caused the accident, it is clear he was at fault. Pino's outrage over this incident at the hearing seems excessive as the accident report[14] notes no damage and the video

[8] GC Exh. 3.
[9] Tr. at 73.
[10] Ibid. at 3a.
[11] Ibid. at 3c.
[12] Ibid. at 3f.
[13] Ibid. at 3g.
[14] Ibid at 3f.

review characterizes the incident as a "bumper tap."[15] There was no evidence adduced that there was damage to either cab. Pino's notes also reflect that Alemu had five total accidents, three of which were at fault. However, it is clear that there were only three countable accidents as no blame was ever assessed to Alemu for the December 23, 2012 incident. Further only two accidents, the August 27 and the November 26, 2013 incidents, were considered at fault. Total damages as a result of the at fault accidents prior to November 26, 2013, was $1565.65.

Respondent contends that it terminated Alemu consistent with its practice of dealing with other drivers with similar accident records and with its policy stated in its employee handbook.[16] This policy has been in place since about March 2012. The handbook states at page 33:

> When an accident is determined by the company to be your fault-or which you largely caused, you may be terminated or be required to pay up to $2000.00 for damages to Nellis property and/or any third party property damage claims that are paid by or on behalf of Nellis as well as complete a one-time, punitive safety driving course, if deemed necessary by management . . . .

Pino testified that in 2012, Respondent changed what it took into account when deciding to fire a driver. This was caused by rising insurance costs Respondent had to pay for insuring its taxis. Pino said he takes into account the amount of damages, whether the accident was the driver's fault, driver attendance, and the productivity of the driver. Pino claimed he looked only at accidents since 2012, but in the case of a long term driver, one hired in 2010, he might look at accidents in 2010 and 2011. However, Pino said there were no hard and fast rules regarding parameters in firing drivers and that each driver's case was different.

Respondent maintains accident files on each of its approximately 400 drivers. The accident files consist of supervisor accident/incident forms created by road and office supervisors such as Wolde and Alonso.[17] Pino reviews the supervisor accident forms together with any video from the taxi and adds his own notes and conclusions[18] in the form of written comments on sticky notes. This information is given to Sandra Pineda, Respondent's claims administrator, who inputs that data into a computer database. The database generates a so called "blue screen"[19] which is a summary of the drivers' accident history. When considering if a driver should be fired for excess accidents, Pino looks only at the blue screen. The first column of the blue screen shows the date of the accident, the next column gives the driver's name, column "F" indicates fault with the letter C reflecting Respondent's driver was at fault, letter A indicating the other vehicle driver was at fault, letter N showing neither driver at fault and letter B meaning both drivers were at fault. The last column shows the Respondent's expenses for the accident. The reserve column shows the amount of money set aside for potential future liability. No blue screen was received into the record for Alemu.

[15] R. Exh. 15, page 6.
[16] GC Exh. 2.
[17] See for example GC Exh. 3 and 10.
[18] See GC Exh. 3c.
[19] See GC Exh. 10, last page.

The record, as shown above, reflects that since 2012, Alemu had three countable accidents, only two of which were considered at fault with expenses caused by the accidents of $1565.65.

General Counsel offered a sample of Respondent's accident files[20] for 24 drivers other than Alemu in 2012 and 2013. These records show 21 drivers with two or more at fault accidents and 17 drivers with four or more total accidents are still employed by Respondent. Fourteen drivers still employed by Respondent had five or more at fault accidents. These drivers had accumulated damages ranging from $566 to over $70,000. Eleven drivers still employed had damages in excess of $4,000. Of three drivers terminated in 2012 and 2013, in addition to Alemu, driver Wolde had eight total accidents, seven of which were at fault, with over $24,000 in damages; driver Tewelde had five total accidents, since January 2013, four of which were at fault with damages over $7,000, and driver Alwadi had 8 total accidents since 2012, five of which were at fault with over $4,000 in damages. In addition, of the 21 drivers still employed, 13 drivers had negative production averages between -4 and -18 with nine drivers having negative productivity greater than or equal to -11.

Respondent submitted accident files[21] on 50 of its drivers, other than Alemu, who were terminated in 2012 and 2013. Respondent's accident files reflect 31 fired drivers had more than two at fault accidents. Nineteen terminated drivers had the same or less than two at fault accidents. However of these 19, six, Dominguez Cruz, Doti, Guo, Hadjar Kedanemariam, and Tadesse had damages in excess of $10,000. Driver Tran, who had four at fault accidents ran a red light with passengers in his cab and was fired not for too many accidents but for a safety violation. Driver Palmeri with only two at fault accidents had a total of five accidents in a 5-month period. Driver Somkhishvili, with only one at fault accident, struck a pedestrian with his cab and was assessed $17,000 in damages. Driver Mohamed, with $5770 in damages had a total of six accidents. Driver Knight, with only one accident, left the scene of the accident and was terminated for this reason as well as for being at fault. Driver Hailemariam, with only one accident and damages of $2275, was only on the job 2-½ months. Similarly driver Haile, with two at fault accidents and $804 in damages was terminated after only 6 months of employment. Driver Green, with one accident and $4812 in damages, failed to pass his probationary period and was fired. Driver Eddik had only one accident and damages of $5982 but was fired when he fell asleep at the wheel and hit a pole with his cab. Driver Azeke had only one accident and damages of $4484 but was fired for hitting a moped driver who was injured and had to go to the hospital. Driver Weldu had two accidents in a 2-month period and only $66 in damages and was fired for failing to pass his probationary period. Driver Bui had only one accident and damages of $2274 in a 10-day period of employment and was fired for failing to pass his probationary period.

In summary, of the 50 drivers fired in 2012 and 2013, only two drivers, Zuza and Wang, like Alemu, had two or fewer at fault accidents and damages of $1532 and $1200 without any extenuating circumstances as noted above such as damages in excess of $10,000 or more than four total accidents. Wang had a total of four accidents, one at fault and Zuza had three total accidents, two at fault.

[20] See generally GC Exh. 3–33 and

[21] See R. Exhs. 16 and 17.

Of the 50 drivers terminated in 2012 and 2013, Respondent's records fail to show productivity rates for 37 drivers. Seven drivers had negative productivity numbers but only one, with a -75 productivity rating, was fired for low production.

B. The Analysis

1. 8(a)(3) and (1) allegations

Complaint paragraphs 5 and 6 allege that Respondent discriminated against Alemu by discharging him for engaging in union or other concerted activity.

In order to establish a violation of Section 8(a)(3) and (1) of the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the burden shifts to Respondent to show that it would have taken the same action even in the absence of the protected activity. *Wright Line*, supra. The employer has the burden of establishing that affirmative defense. Id.

Discriminatory motive may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (2010); the timing between discovery of the employee's protected activities and the discipline, *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions, *Mid-Mountain Foods*, 332 NLRB 251, 251 n. 2, (2000); evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Company*, 360 NLRB No. 43 (2014); *ManorCare Health Services–Easton,* 356 NLRB No. 39, slip op. at p. 3 (2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n. 12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom., *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

The record reflects that since February 2012, Alemu has been involved in both concerted activity and union organizing activity both of which were known to Respondent. In March of 2012, Respondent's Supervisor Alonso threatened Alemu with the futility of organizing the union. Judge Pollack found that Respondent unlawfully suspended 17 of its drivers for engaging in a concerted work stoppage and Judge Etchingham found that Respondent violated the Act by coercively interrogating its driver Firesilassie Woldeyes about his union activity, by threatening Woldeyes with discharge and blacklisting from hire by other companies due to his union activity and by threatening employees with reduced pay and the futility of employees selecting the union

as their bargaining representative. Judge Etchingham also found Respondent violated Section 8(a)(3) of the Act by discharging Woldeyes for engaging in union activity.

I find that General Counsel has established that Alemu was engaged in both union and protected concerted activity that was known to Respondent and that its animus, as shown in the findings of both Judges Pollack and Etchingham, was a motivating factor in Respondent's decision to fire Alemu.

Respondent defends that it would have terminated Alemu despite his protected activity because he incurred too many accidents while driving his cab, consistent with its practice since 2012 of terminating drivers with excessive accident records. A review of the extensive documentary record regarding Respondent's discipline of its drivers for excessive accidents reveals that Respondent has no consistent policy with respect to what constitutes excessive accidents for its drivers. This conclusion is not only bolstered by the driver's records but also by the testimony of Jaime Pino who was the primary person responsible for deciding which drivers to fire.

In an exchange with Counsel for the General Counsel concerning Respondent's policy for terminating drivers with excessive accident records, Pino testified:[22]

> Q BY MR. HIGLEY: So if somebody has for example 10 A accidents (other driver's fault) and only 1 C accident (Respondent driver's fault), might you still discharge that employee?
>
> A It all depends. It depends on so many different factors. When you say they're all A, meaning none of them are at fault and only one of them is at fault, that you described. If it's a good producer, if his productivity is good I might -- and depending how long he's been there -- there's a lot of things that I can't give you a black and white answer on that. It all depends on the type of driver, how many years he's been there, what kind of a driver he is. So I do take in consideration everything but the result might not be the same.

In later testimony[23] Pino was similarly vague concerning the weight Respondent gives to at fault accidents in deciding to terminate a driver:

> Q BY MR. HIGLEY: Do you give more weight to the at fault accidents in your evaluation?
>
> A It depends. Sometimes.
>
> Q What does it depend on?
>
> A Depends on the driver. When I look at the video I mean if I see the driver is -- there was any way that he could avoided the accident. There's a lot of factors –

[22] Tr. at 84–85.
[23] Tr. at 91.

Q Okay.

A -- that I look into.

Q So it depends on the behavior of the driver and the specific accident.

A Right. Exactly.

Again in further testimony[24] Pino was equivocal about the weight given to frequency of accidents as a factor in firing a driver:

> Q Okay. What -- you mentioned frequency. What if anything did you do concerning frequency?
>
> A We don't -- we -- we're not as tolerant as we used to be in the past. If I have a driver that fault, not at fault, minor accident but he's got too many sometime we just let him go. We don't give him too many breaks. Depending on the driver and every driver's different it has -- there's a lot of things that we look into.

Pino's testimony reflects that Respondent's considerations for whom it would terminate was totally arbitrary. This is supported by the files of Respondent's employees received into the record. General Counsel's exhibits[25] show that Respondent retained drivers with far worse accident records than Alemu. Respondent's exhibits[26] are no less damning. These exhibits show that of 50 drivers it fired in 2012 and 2013, 48 had worse driving records than Alemu. While some drivers had the same or less total accidents than Alemu, there were extenuating circumstances in all cases but two drivers that distinguished their driving record from that of Alemu.

As to Alemu's productivity, his notice of termination does not mention lack of productivity as a reason for his termination. According to his notice of employee termination,[27] Alemu was fired for, "Too many accidents since he was rehire (sic)." Only at the hearing did Pino add low productivity as a consideration in terminating Alemu. While Alemu had a -22 productivity rating when he was fired, the record reflects that Respondent retained 13 drivers who had negative production averages between -4 and -18, all of whom had worse accident records than Alemu. Of the 13 drivers, 9 had negative productivity greater than or equal to -11.

I conclude that Respondent has failed in its burden of establishing that it would have fired Alemu in accordance with its past practice of terminating employees with poor driving records. Respondent has no coherent policy regarding firing drivers for excessive accidents. This absence of a coherent policy that defies logic and Respondent's obvious disparate treatment of similarly situated employees leads to the inference that Respondent's asserted reason for the employee's discipline was pretextual. *Lucky Cab Company*, 360 NLRB No. 43 (2014); *ManorCare Health Services – Easton,* 356 NLRB No. 39, slip op. at p. 3 (2010); *Greco & Haines, Inc.,* 306 NLRB

[24] Tr. at 288–289.
[25] GC Exh. 3 and 10–33.
[26] R. Exhs. 16 and 17.
[27] GC Exh. 5.

634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n. 12, *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), *enfd. sub nom.*, *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

I find that Respondent terminated Alemu in violation of Section 8(a)(3) and (1) of the Act.

2. 8(a)(4) and (1) allegations

Section 8(a)(4) of the Act makes it unlawful, "to discharge or otherwise to discriminate against an employee because he has filed charges or given testimony under this Act;" In order to find a violation of Section 8(a)(4) of the Act, a *Wright Line* analysis is followed. *American Garden's Management Co.,* 338 NLRB 644, 645 (2002). The remedy is the same. *Newcor Bay City Division*, 351 NLRB 1034 fn.4 (2007); *All Pro Vending, Inc.*, 350 NLRB 503, 515 (2007). Proof of unlawful motive may be inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004). The timing of discharges may support a finding that the discharges were motivated by the employee's testimony before the Board. *Gary Enterprises, Inc.,* 300 NLRB 1111, 1113 (1990).

It is undisputed that Respondent was aware that Alemu gave testimony in support of charging party Firesilassie Woldeyes against Respondent before Judge Etchingham in case 28–CA–106245 on November 5, 2013. Alemu was fired by Respondent on December 2, 2013. While Respondent argues that Alemu's testimony was so inconsequential that Respondent would not consider retaliating against Alemu for it, Judge Etchingham thought it significant enough to support a finding that Respondent violated Section 8(a)(1) of the Act as a threat to Alemu of the futility of selecting the union as bargaining representative.

General Counsel has established its burden under *Wright Line* of showing that Alemu gave testimony in a Board proceeding, that Respondent was aware of that testimony and the timing of Alemu's discharge less that 30 days later suggests that the discharge was motivated by Alemu's testimony. Moreover, as I have found above, Respondent's asserted reasons for firing Alemu are mere pretext and will not support a *Wright Line* defense. I find that Respondent also discharged Alemu in violation of Section 8(a)(4) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Sun Cab, Inc., d/b/a Nellis Cab Company is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(3) and (4)of the Act:

THE REMEDY

In addition to the ordinary remedies, General Counsel seeks the extraordinary remedy of a broad cease and desist order that requires Respondent to cease and desist from violating the Act "in any other manner." Broad injunctive relief is appropriate when a respondent is shown to have "a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to

demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods,* 242 NLRB 1357, 1357 (1979).

In this case while two administrative law judges have previously found Respondent has violated the Act in suspending and firing employees. The Board has yet to rule on these cases. I conclude that a sufficient history has not yet been established to show that Respondent has shown a proclivity to violate the Act. Should these cases be reviewed by the Board, it may determine at that time if a broad cease and desist order is appropriate.

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The evidence having established that the Respondent discharged its employee Dawit Alemu, my recommended order requires the Respondent to make him whole. My recommended order also requires the Respondent to offer Dawit Alemu immediate reinstatement to his former position, displacing if necessary any replacements, or if his position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. My recommended order further requires that backpay shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

The recommended order also requires that the Respondent shall expunge from its files and records any and all references to the unlawful discharge of Dawit Alemu and to notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way. *Sterling Sugars, Inc.,* 261 NLRB 472 (1982). Further, the Respondent must not make any reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against him in any other way.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring,* 356 NLRB No. 8 (Oct. 22, 2010).

General Counsel also requests that discriminatee be reimbursed for any excess taxes owed as a result of a lump sum backpay award and that Respondent be ordered to complete the appropriate paperwork as set forth in IRS Publication 975 to notify the Social Security Administration what periods to which the backpay should be allocated as requested in the remedy section of the complaint.

In *Tortillas Dan Chavas,* 361 NLRB No. 10 (2014), Board ordered that it will routinely require the filing of a report with the Social Security Administration allocating backpay awards

to the appropriate calendar quarters. The Board also held that it will routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump sum backpay awards covering periods longer than 1 year. The Board concluded that it is the General Counsel's burden to prove and quantify the extent of any adverse tax consequences resulting from the lump-sum backpay award and that such matters shall be resolved in compliance proceedings.

Pursuant to *Tortillas Dan Chavas*, I will order that Respondent shall file a report with the Social Security Administration allocating any backpay awards to the appropriate calendar quarters.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[28]

ORDER

Respondent, Sun Cab, Inc., d/b/a Nellis Cab Company, Las Vegas, Nevada, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Firing you because of your union membership or support for the Industrial, Technical and Professional Employees Union, Local 4873, affiliated with Office and Professional Employees International Union, AFL–CIO or because you offered testimony in a National Labor Relations Board proceeding.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Dawit Alemu full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Dawit Alemu whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest.

(c) Compensate Dawit Alemu for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

[28] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

(d) Within 14 days from the date of this Order, remove from its files all references to the discharge of Dawit Alemu on December 3, 2013, and, within 3 days thereafter, notify him in writing that this has been done and that this action will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 2, 2013.

(g) Within 21 days after service by the Region, filed with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. October 3, 2014

John J. McCarrick
Administrative Law Judge

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT fire you because of your union membership or support for the Industrial, Technical and Professional Employees Union, Local 4873, affiliated with Office and Professional Employees International Union, AFL–CIO or because you offered testimony in a National Labor Relations Board proceeding.

WE WILL NOT in like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Dawit Alemu his job back along with his seniority and all other rights or privileges.

WE WILL pay Dawit Alemu for the wages and other benefits he lost because we fired him.

WE WILL pay Dawit Alemu for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file reports with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files any reference to the discharge of Dawit Alemu and notify him in writing that this has been done and that this action will not be used against him in any way.

SUN CAB, INC., D/B/A NELLIS CAB COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1400, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-118942 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.